

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL PERRY,

Plaintiff,

v.

ACTIVISION BLIZZARD, INC., BOBBY
KOTICK, BRIAN KELLY, REVETA
BOWERS, ROBERT CORTI, HENDRIK
HARTONG III, BARRY MEYER, ROBERT
MORGADO, PETER NOLAN, DAWN
OSTROFF, and CASEY WASSERMAN,

Defendants.

Case No.:

JURY TRIAL DEMANDED

**COMPLAINT FOR VIOLATIONS OF
FEDERAL SECURITIES LAWS**

Plaintiff, by his undersigned attorneys, for this complaint against defendants, alleges upon personal knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as follows:

BACKGROUND

1. This action concerns a proposed transaction (“Proposed Transaction”) announced on January 18, 2022 pursuant to which Activision Blizzard, Inc. (“Activision” or the “Company”) will be acquired by Microsoft Corporation (“Microsoft”).

2. On January 18, 2022, Activision Board of Directors (the “Board” or “Individual Defendants”) caused the Company to enter into an agreement and plan of merger (the “Merger Agreement”). Pursuant to the terms of the Merger Agreement, Activision shareholders will receive \$95.00 in cash per share for each share of Activision common share they own (the “Merger Consideration”).

3. On February 18, 2022, in order to convince Activision’s shareholders to vote in favor of the Proposed Transaction, Defendants filed a materially incomplete and misleading Proxy

Statement (the “Proxy”) with the United States Securities and Exchange Commission (“SEC”).

4. The Proxy omits material information with respect to the Proposed Transaction, which renders the Proxy false and misleading. Accordingly, Plaintiff alleges herein that defendants violated Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “1934 Act”) in connection with the Proxy.

5. In addition, a special meeting of Activision’ stockholders will be held to vote on the Proposed Transaction (the “Stockholder Vote”). It is therefore imperative that the material information that has been omitted from the Proxy is disclosed prior to the Stockholder Vote so Activision’s stockholders can properly exercise their corporate voting rights and make an informed decision on whether to vote in favor of the merger.

JURISDICTION & VENUE

6. This Court has jurisdiction over the claims asserted herein pursuant to Section 27 of the 1934 Act and 28 U.S.C. §1331 because the claims asserted herein arise under Sections 14(a) and 20(a) of the 1934 Act and Rule 14a-9.

7. This Court has jurisdiction over Defendants because each defendant is either a corporation that conducts business in this District, or is an individual with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

8. Venue is proper in this District under Section 27 of the Exchange Act, 15 U.S.C. § 78aa, as well as under 28 U.S.C. § 1391, because, among other things: (a) the conduct at issue will have an effect in this District; (b) a substantial portion of the transactions and wrongs complained of herein, occurred in this District; and (c) certain Defendants have received substantial compensation in this District by doing business here and engaging in numerous

activities that had an effect in this District. Additionally, the Company's shares trade on the NASDAQ, which is headquartered in this District.

THE PARTIES

9. Plaintiff is, and has been continuously throughout all times relevant hereto, an Activision shareholder.

10. Activision is a Delaware corporation and a party to the Merger Agreement. Activision shares are traded on the NASDAQ under the ticker symbol "ATVI."

11. Defendant Bobby Kotick is the Company's Chief Executive Officer and a director of the Company.

12. Defendant Brian Kelly is Chairman of the Board and a director of the Company.

13. Defendant Reveta Bowers is a director of the Company.

14. Defendant Robert Corti is a director of the Company.

15. Defendant Hendrik Hartong III is a director of the Company.

16. Defendant Barry Meyer is a director of the Company.

17. Defendant Robert Morgado is a director of the Company.

18. Defendant Peter Nolan is a director of the Company.

19. Defendant Dawn Ostroff is a director of the Company.

20. Defendant Casey Wasserman is a director of the Company.

FACTS

21. Activision is a global developer and publisher of interactive entertainment content and services. Company develops and distributes content and services on video game consoles, personal computers and mobile devices

22. Microsoft develops and supports a wide range of software, services, devices,

and solutions that deliver new opportunities, greater convenience and enhanced value to people's lives. Microsoft offers an array of services, including cloud-based solutions, that provide customers with software, services, platforms and content. Microsoft's products include operating systems, cross-device productivity applications, server applications, business solution applications, desktop and server management tools, software development tools, and games. Microsoft also designs and sells devices, including PCs, tablets, gaming and entertainment consoles, other intelligent devices, and related accessories.

23. On January 18, 2022, Activision Board caused the Company to enter into the Merger Agreement.

24. According to the press release announcing the Proposed Transaction:

REDMOND, Wash. and Santa Monica, Calif. – Jan. 18, 2022 – With three billion people actively playing games today, and fueled by a new generation steeped in the joys of interactive entertainment, gaming is now the largest and fastest-growing form of entertainment. Today, Microsoft Corp. (Nasdaq: MSFT) announced plans to acquire Activision Blizzard Inc. (Nasdaq: ATVI), a leader in game development and interactive entertainment content publisher. This acquisition will accelerate the growth in Microsoft's gaming business across mobile, PC, console and cloud and will provide building blocks for the metaverse. Microsoft will acquire Activision Blizzard for \$95.00 per share, in an all-cash transaction valued at \$68.7 billion, inclusive of Activision Blizzard's net cash. When the transaction closes, Microsoft will become the world's third-largest gaming company by revenue, behind Tencent and Sony. The planned acquisition includes iconic franchises from the Activision, Blizzard and King studios like "Warcraft," "Diablo," "Overwatch," "Call of Duty" and "Candy Crush," in addition to global eSports activities through Major League Gaming. The company has studios around the world with nearly 10,000 employees.

Advisors

Goldman Sachs & Co. LLC is serving as financial advisor to Microsoft and Simpson Thacher & Bartlett LLP is serving as legal counsel. Allen & Company LLC is acting as financial advisor to Activision Blizzard and Skadden, Arps, Slate, Meagher & Flom LLP is serving as legal counsel.

25. The Merger Consideration is unfair because, among other things, the intrinsic

value of the Company is in excess of the amount the Company's stockholders will receive in connection with the Proposed Transaction.

26. It is therefore imperative that the Company's shareholders receive the material information that Defendants have omitted from the Proxy so that they can meaningfully assess whether the Proposed Transaction is in their best interests prior to the vote.

27. Section 5.3 of the Merger Agreement has a "no solicitation" clause that prevents Activision from soliciting alternative proposals and constraints its ability to negotiate with potential buyers:

No Solicitation or Negotiation.

Subject to the terms of Section 5.3(b), from the date of this Agreement until the earlier to occur of the termination of this Agreement pursuant to Article VIII and the Effective Time, the Company will cease and cause to be terminated any discussions or negotiations with and terminate any data room access (or other diligence access) of any Person and its Affiliates, directors, officers, employees, consultants, agents, representatives and advisors (collectively, "**Representatives**") relating to any Acquisition Transaction. Promptly following the date of this Agreement, the Company will request that each Person (other than Parent and its Representatives) that has, prior to the date of this Agreement, executed a confidentiality agreement in connection with its consideration of acquiring the Company to promptly return or destroy all non-public information furnished to such Person by or on behalf of the Company or any of its Subsidiaries prior to the date of this Agreement in accordance with the terms of such confidentiality agreement. Subject to the terms of Section 5.3(b) and Section 5.3(d), from the date of this Agreement until the earlier to occur of the termination of this Agreement pursuant to Article VIII and the Effective Time, the Company and its Subsidiaries and their respective directors, executive and other officers will not, and the Company will not authorize or direct any of its or its Subsidiaries' employees, consultants or other Representatives to, directly or indirectly, (i) solicit, initiate, propose or induce the making, submission or announcement of, or knowingly encourage, facilitate or assist, any proposal, offer or inquiry that constitutes, or is reasonably expected to lead to, an Acquisition Proposal; (ii) furnish to any Person (other than Parent, Merger Sub or any designees of Parent or Merger Sub) any non-public information relating to the Company or any of its Subsidiaries or afford to any Person access to the business, properties, assets, books, records or other non-public information, or to any personnel, of the Company or any of its Subsidiaries (other than Parent, Merger Sub or any designees of Parent or Merger Sub), in any such case in connection with any Acquisition Proposal or

with the intent to induce the making, submission or announcement of, or to knowingly encourage, facilitate or assist, an Acquisition Proposal or any inquiries or the making of any proposal that would reasonably be expected to lead to an Acquisition Proposal; (iii) participate or engage in discussions or negotiations with any Person with respect to an Acquisition Proposal, or with respect to any inquiries from third Persons relating to making a potential Acquisition Proposal (other than solely to inform such Persons of the provisions contained in this Section 5.3); (iv) approve, endorse or recommend any proposal that constitutes, or is reasonably expected to lead to, an Acquisition Proposal; (v) enter into any letter of intent, memorandum of understanding, merger agreement, expense reimbursement agreement, acquisition agreement or other Contract relating to an Acquisition Transaction, other than an Acceptable Confidentiality Agreement (any such letter of intent, memorandum of understanding, merger agreement, acquisition agreement or other Contract relating to an Acquisition Transaction, an “**Alternative Acquisition Agreement**”); or (vi) authorize or commit to do any of the foregoing. From the date of this Agreement until the earlier to occur of the termination of this Agreement pursuant to Article VIII and the Effective Time, the Company will not be required to enforce, and will be permitted to waive, any provision of any standstill or confidentiality agreement to the extent necessary to permit a confidential proposal being made to the Company Board (or any committee thereof).

28. In addition, Section 8.3 of the Merger Agreement requires Activision to pay up to a \$2,270,100,000 “termination fee” in the event this agreement is terminated by Activision and improperly constrains the Company from obtaining a superior offer. Such a termination fee is excessive and unduly restrictive to Activision’s ability to consider other offers.

29. Defendants filed the Proxy with the SEC in connection with the Proposed Transaction.

30. The Proxy omits material information concerning Activision’s financial projections.

31. With respect to Activision’s financial projections, the Proxy fails to disclose (1) all line items underlying (i) Revenue; (ii) EBIT (Pre-SBC); (iii) Adj. EBITDA; and (iv) Unlevered FCF; and (2) a reconciliation of all non-GAAP metrics.

32. The disclosure of projected financial information is material information necessary for shareholders to gain an understanding of the basis for any projections as to the future financial performance of the combined company. In addition, this information is material and necessary for shareholders to understand the financial analyses performed by the companies' financial advisors rendered in support of any fairness opinion.

33. Second, the Proxy omits material information regarding the analyses performed by the Company's financial advisor, Allen & Company LLC ("Allen") connection with the Proposed Transaction.

34. With respect to Allen's *Select Company Analysis*, the Proxy fails to disclose the multiples and metrics for the selected companies observed by Allen in its analysis and the representative ranges used to calculate financial multiples.

35. With respect to Allen's *Selected Precedent Transactions Analysis*, the Proxy Statement fails to disclose the multiples and metrics of the selected transactions.

36. With respect to Allen's *Discounted Cash Flow Analysis*, the Proxy fails to disclose (i) unlevered, after-tax free cash flows; (ii) the terminal value of the Company; (iii) the individual inputs and assumptions underlying (a) the perpetuity growth rates range of 2.25% to 2.75% and (b) discount rates range of 6.50% to 8.00%.

37. With respect to Allen's research analyst price targets, the Proxy fails to disclose: (i) the Wall Street research reports and (ii) the price targets observed.

38. The omission of the above-referenced material information renders the Proxy false and misleading.

39. The above-referenced omitted information, if disclosed, would significantly alter the total mix of information available to the Company's stockholders.

CLAIMS FOR RELIEF

COUNT I

(AGAINST ALL DEFENDANTS FOR VIOLATIONS OF SECTION 14(a) OF THE EXCHANGE ACT AND RULE 14a-9 PROMULGATED THEREUNDER)

40. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

41. Rule 14a-9, promulgated by the SEC pursuant to Section 14(a) of the Exchange Act, requires that Proxy communications with stockholders shall not contain “any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.” 17 C.F.R. § 240.14a-9.

42. Defendants issued the Proxy with the intention of soliciting stockholder support for the Proposed Transaction. Each of the Defendants reviewed and authorized the dissemination of the Proxy and the use of their name in the Proxy, which fails to provide critical information regarding, among other things, the financial projections that were prepared by the Company and relied upon by the Board in recommending the Company’s stockholders vote in favor of the Proposed Transaction.

43. In so doing, Defendants made untrue statements of fact and/or omitted material facts necessary to make the statements made not misleading. By virtue of their roles as officers and/or directors, each of the Individual Defendants was aware of the omitted information but failed to disclose such information, in violation of Section 14(a). The Individual Defendants were, therefore, negligent, as they had reasonable grounds to believe material facts existed that were misstated or omitted from the Proxy, but nonetheless failed to obtain and disclose such information to stockholders as required.

44. The preparation of a Proxy by corporate insiders containing materially false or misleading statements or omitting a material fact constitutes negligence. Defendants were negligent in preparing and reviewing the Proxy. Defendants were also negligent in choosing to omit material information from the Proxy or failing to notice the material omissions in the Proxy upon reviewing it, which they were required to do carefully.

45. The misrepresentations and omissions in the Proxy are material to Plaintiff, who will be deprived of his right to cast an informed vote if such misrepresentations and omissions are not corrected prior to the vote on the Proposed Transaction. Plaintiff has no adequate remedy at law.

COUNT II

(AGAINST THE INDIVIDUAL DEFENDANTS FOR VIOLATIONS OF SECTION 20(a) OF THE EXCHANGE ACT)

46. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

47. The Individual Defendants acted as controlling persons of the Company within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as directors of the Company, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the incomplete and misleading statements contained in the Proxy filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that Plaintiff contends are materially incomplete and misleading.

48. Each of the Individual Defendants was provided with or had unlimited access to copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or

shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

49. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the Exchange Act violations alleged herein, and exercised the same. The omitted information identified above was reviewed by the Board prior to voting on the Proposed Transaction. The Proxy at issue contains the unanimous recommendation of the Board to approve the Proposed Transaction. The Individual Defendants were thus directly involved in the making of the Proxy.

50. In addition, as the Proxy sets forth at length, and as described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The Proxy purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

51. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

52. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

53. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

- A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;
- B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages;
- C. Directing the Individual Defendants to disseminate a Proxy that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;
- D. Declaring that defendants violated Sections 14(a) and/or 20(a) of the 1934 Act, as well as Rule 14a-9 promulgated thereunder;
- E. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- F. Granting such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues so triable.

Dated: March 14, 2022

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